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IN THE

Supreme Court of the United States

October Term, 1963

No. 961

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

MARY GREEN,

Respondent.

THE AMERICAN TOBACCO COMPANY,

Petitioner,

—v.—

EDWIN GREEN, JR., as Administrator of the Estate of EDWIN GREEN, deceased,

Respondent.

PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Dated: May 13, 1964

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Plaintiffs' Misstatement of the Issue to Be Retried

Respondents* in opposing the petition in No. 961 misread the opinion of the Court of Appeals below with respect to the issue to be decided on the new trial.

First, although defendant believes that the new trial was improperly narrowed in scope, it was not so limited as plaintiffs now insist. The question to be retried is not

* Respondents were plaintiffs below and petitioner the defendant and will hereinafter be referred to as such.

simply that of "reasonable fitness" (Pl. Br., p. 2) but of defendant's liability for breach of implied warranty.*

The judgments entered on the jury's general verdicts previously deciding that issue for defendant have been reversed (Pet. App., p. 12a). The general verdicts, themselves, are now vacated (*id.*, p. 9a). Thus the ultimate issue of defendant's liability remains unresolved until decided by the new jury on retrial.

Defendant's position is, of course, that all of the factual questions entering into the determination of this issue should be passed upon by the new jury and that liability cannot be properly retried by foreclosing from re-litigation the factual matters included in the interrogatories answered by the first jury.

Second, the Court of Appeals did not define the "reasonable fitness" question to be retried in terms of the product's fitness "to the general public", as plaintiffs would have this Court believe (Pl. Br., pp. 2, 5, 10, 12). Nor did it hold that defendant's cigarettes were "unfit and unwholesome" as to Mr. Green in light of the jury's answer to interrogatory 3, as plaintiffs also imply (*id.*, pp. 6, 10).** The Court of Appeals simply determined that the scope of defendant's implied warranty was limited to an undertaking that the product was "reasonably fit and wholesome" (Pet. App. A, p. 5a). And it concluded, after receiving the Florida Supreme Court's advisory opinion, that despite the general verdicts for defendant, the jury had not made a sufficient finding as to whether or not that undertaking had been satisfied (*id.*, pp. 7a-8a).

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* References to "Pl. Br." are to the respondents' brief in opposition to the petition in No. 961. References to "Pet." are to the petition in No. 961.

** Neither did the Supreme Court of Florida so hold (Pet. App. E, pp. 57a-58a). See defendant's brief in opposition to plaintiff's cross petition for certiorari in this case (No. 997).

One question specifically designated for retrial, therefore, was whether defendant's product was "reasonably fit". But neither the Court of Appeals nor the Supreme Court of Florida indicated that a jury could answer this question properly without regard to all the facts and circumstances, although by barring re-litigation of the matters included in the first jury's answers to the interrogatories, the Court of Appeals effectively prevented the second jury from determining for itself what those facts and circumstances were.

In short, as we have previously pointed out (Pet., p. 19), the factual matters included in the first jury's answers to the interrogatories are related both to the unresolved ultimate issue of liability and to the unresolved factual questions, including the "reasonable fitness" question. In these circumstances, the preservation of the answers to bind the second jury is indeed unprecedented.

Certainly nothing in *Norfolk S. R. Co.* v. *Forehee*, 238 U. S. 269 (1915), which plaintiffs cite (Pl. Br., p. 7), is to the contrary. There a partial new trial on damages alone was granted and special verdicts found by the first jury were preserved, this Court finding that the question of damages was "in fact separable" (*id.* at 273). But unlike the case at bar no general verdict for defendant was involved and the liability issue was resolved at the first trial. Moreover, this Court was careful to point out that the practice of granting partial new trials "is not to be commended" (*id.* at 274).

No Mere "Procedural Irregularity" Is Involved

Nor is the ruling below an example of mere procedural irregularity (Pl. Br., p. 7). Defendant of course recognizes that partial new trials when properly granted do not offend

the Seventh Amendment (Pl. Br., pp. 6-7). But where, as here, the dual prerequisites to the granting of a partial new trial, as set forth in the *Gasoline Products* case, are not satisfied (Pet., pp. 17-18), the ordering of a partial new trial is not an offense to "propriety" alone (Pl. Br., p. 8). For, we submit, the requirements of the Seventh Amendment can never be satisfied by an order "which would amount to a denial of a fair trial." *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U. S. 494, 500 (1931).*

Finally, any implication that this case has taken over six years because of "delay or error induced by the American Tobacco Company" (Pl. Br., p. 11) is wholly unjustified. Plaintiffs, not defendant, began this action in the Federal court, thereby requiring state law to be determined by that court. As the court below stated in granting plaintiffs' application to go before the Florida Supreme Court, there was "no Florida decision precisely in point and so clearly on all fours as to be dispositive of this question or proposition of law" (Pet. App., p. 54a). The question the court there referred to was the very knowledge question plaintiffs introduced into this case by their complaint and told the jury it had to decide (R. 4, 35-6). The present proceedings have unfortunately been made necessary to some extent because of plaintiffs' insistence in the court below that it would be "unusually onerous" (Pet. App., p. 9a) to re-

* If by citing Rule 59(a) of the Federal Rules of Civil Procedure (Pl. Br., pp. 7-9), plaintiffs are suggesting some relationship to Rule 49(b) involved here, then we point out that Rule 59(a) merely incorporates the rule of the *Gasoline Products* case, *supra*. See the Advisory Committee's Notes to the Rules of Civil Procedure for the District Courts of the United States (1938), p. 56. Nor do the cases cited by plaintiffs (Pl. Br., pp. 8-9) add anything to the discussion, because they are merely examples of permissible partial new trials on separable issues—clearly not the situation here.

quire them to "re-litigate" the issue of defendant's liability—a jury finding indispensable to recovery and one they have thus far failed to obtain.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari in No. 961 to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted.

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Dated: May 13, 1964

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief in Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari was served by mail this 13th day of May, 1964 upon Neal P. Rutledge, 111 N.E. 1st Street, Miami, Florida, and upon Lawrence V. Hastings, 312 Biscayne Building, Miami, Florida, counsel of record for respondents herein, by depositing the same in a United States mail box at 25 Broadway, New York 4, N. Y., in a wrapper addressed to each of said counsel as aforesaid with sufficient airmail postage prepaid.

EDWARD R. NEAHER
Counsel for Petitioner

Dated: May 13, 1964